LEE CHAN LEONG

v.

JURUTERA KONSULTANT (SEA) SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO W-02-492-1999]
25 JULY 2002

CIVIL PROCEDURE: *Contempt of court - Administration of justice - Letter to chief judge - Whether tantamount to interference - Right to fair hearing - Federal Constitution, arts. 5 and 8 - Whether proceedings for contempt was in breach of rules of natural justice - Whether conviction to be set aside*

This was an appeal by the appellant, an advocate and solicitor, against a finding of contempt held against him by the High Court judge. The appellant argued for his conviction to be quashed and the sentence be set aside. He also appealed for a refund of the fine levied in consequence to his conviction.

Held:
Per Gopal Sri Ram JCA

[1] There was no formal charge formulated and framed against the appellant. The notice to show cause did not allege any misconduct or criminality on the appellant's part necessitating an answer. (p 5 h)

[2] Articles 5 and 8 of the Federal Constitution provide for the fundamental right to a fair procedure before one is punished. In the present matter, no indication was given to the appellant that he would be punished at the conclusion of the inquiry. The said notice for show-cause merely required the appellant to appear and to be examined. On this ground alone the contempt proceedings was a nullity. (p 6 d-e)

[3] The contents of the letter sent to chief judge did not impede or obstruct the course of justice. Neither was there any express or implied libel against the judge. At most, it mentioned of a settlement reached or words to that effect and as such was not contempt. (p 7 d)

[4] The appellant displayed no defiance. In fact, he had apologised several times for the misunderstanding which had occurred through no fault of his and for an incident of which he was neither the author nor the cause. (p 7 g)

[Appeal allowed; conviction quashed, sentence set aside and fine paid to be refunded.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan oleh perayu, seorang peguambela dan peguamcara, terhadap satu keputusan penghinaan yang diputuskan terhadap beliau oleh hakim Mahkamah Tinggi. Perayu berhujah supaya pensabitan beliau dibatalkan dan hukuman diketepikan. Beliau juga merayu untuk mendapatkan kembali denda yang dilevikan akibat pensabitan beliau.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Tidak terdapat pertuduhan rasmi yang dirumuskan dan dibuat terhadap perayu. Notis untuk menunjukkan sebab tidak mendakwa sebarang salah laku atau jenayah di pihak perayu yang mewajibkan suatu jawapan.

[2] Artikel-artikel 5 dan 8 Perlembagaan Persekutuan memperuntukan hak asasi kepada satu prosedur yang adil sebelum seseorang dihukum. Dalam perkara semasa, tiada petanda diberikan kepada perayu bahawa beliau akan dihukum setelah penamatan siasatan. Notis untuk menunjukkan sebab itu hanya menghendaki perayu hadir dan diperiksa. Atas alasan ini sahaja, prosiding penghinaan tersebut merupakan suatu pembatalan.

[3] Kandungan surat yang dikirimkan kepada ketua hakim tidak menghalang atau mencegah perjalanan keadilan. Tidak terdapat juga sebarang libel nyata atau tersirat terhadap hakim. Paling tidak pun, ianya menyatakan mengenai penyelesaian yang telah dicapai atau perkataan-perkatan berkaitan dengannya dan oleh yang demikian bukannya penghinaan.

[4] Perayu tidak menunjukkan sebarang tentangan. Malahan, beliau telah memohon maaf beberapa kali bagi salah-faham yang telah berlaku bukan diakibatkan oleh beliau dan bagi satu peristiwa di mana beliau bukan penyebab atau pelakunya.

[Rayuan dibenarkan; pensabitan dibatalkan, hukuman diketepikan dan denda yang dibayar hendaklah dikembalikan.]

Case(s) referred to:
Dinanbandhu Sahu v. The State of Orissa AIR [1972] SC 180 ***(refd)***
Johnson v. Grant [1923] SC 789 ***(refd)***
Maharaj v. Attorney-General of Trinidad and Tobago [1977] 1 All ER 411 ***(refd)***
Solicitor-General v. Radio Avon Ltd [1978] 1 NZLR 225 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 20, para 12 of the schedule
Federal Constitution, arts. 5, 8

For the appellant - DP Naban (Wong Kian Kheong & Andrew Chiew Ean Vooi); M/s Lee Hishamuddin
For the 1st, 2nd & 3rd respondents - Joseph Yeo; M/s Joseph Yeo
For the 4th, 5th & 6th respondents - M/s Chan Leong & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S2-22-682-98]

Reported by M Maheswaran

JUDGMENT

(oral)

Gopal Sri Ram JCA (delivering the unanimous judgment of the court): This is an unfortunate case. It need never have happened. It happened because of a lack of judicial restraint and understanding. The facts are simple enough.

This appellant is an advocate and solicitor of these courts. He was engaged to appear with senior counsel in a matter before the High Court at Kuala Lumpur. There were some parallel proceedings in the High Court at Shah Alam. Certain findings were made by the Shah Alam High Court. Counsel leading the appellant contended that those findings were binding on the parties in the Kuala Lumpur proceedings. There was a meeting before the registrar of the Kuala Lumpur High Court. Apparently, the appellant and the counsel instructed by the lay-client gained an impression at that meeting that the judge hearing the Kuala Lumpur proceedings had taken the position that he was not bound by the findings made in the Shah Alam High Court.

Not unnaturally, the appellant and leading counsel became anxious as to the future course of the Kuala Lumpur proceedings. They thought that the matter was one upon which the learned judge had made up his mind. So, quite appropriately, the appellant wrote to the Chief Judge of Malaya for a transfer of proceedings.

In the old days, such a course would have been unnecessary. Paragraph 12 of the Schedule of the Courts of Judicature Act 1964 ("the Act") provides for a transfer of proceedings. From our experience at the Bar and the judicial and legal service respectively, such applications were made by summons in chambers to the relevant judge. There was hardly any acrimony in the matter. Such applications were dealt with as of course. However, a few years ago, the view was taken that because of s. 20 of the Act, such applications required the intervention of the Chief Judge of Malaya or the Chief Judge of Borneo, as the case may be.

We set out this brief history about applications for transfer so that someone who reads this judgement would understand why that letter that was written to the Chief Judge of Malaya. The letter in question does not cast any aspersion either on the integrity or on the person of the learned judge in the High Court of Kuala Lumpur. Yet, it gave rise to much acrimony. A notice to show cause was issued. Both counsel and the appellant had to appear before the learned judge. Both tendered their apologies, although in our view none was necessary. Both were excused and the notice was discharged.

There then took place a dialogue between the judge, the appellant and his learned leader. Apparently, the learned judge gave an assurance to counsel about the future conduct of the case before him. It appears from the documents on record that the appellant was entirely satisfied with whatever assurance that had been given to counsel by the learned judge. At the conclusion of the meeting with the learned judge, he informed counsel that he (the learned judge) would be making a full report to the Chief Judge of Malaya.

The appellant then wrote a very brief letter to the Chief Judge. His explanation appears to be that he did not wish to put anything more in his letter as what he might say may conflict with the report that the learned judge was proposing to make to the Chief Judge. However, that letter produced dire consequences for the appellant quite unexpectedly. For, the learned judge took umbrage with the contents of the letter. He issued a notice to the appellant to be examined. Both the letter and notice are important documents. They should be produced to be read. We do so now.

Shorn of all its formalities, this is what the appellant's letter said:

> 2. Kami menulis untuk memaklumkan Yang Amat Arif bahawa perkara yang dibangkitkan dalam surat kami terdahulu telahpun diselesaikan dengan sewajarnya oleh Yang Arif Hakim Mahkamah Tinggi Kuala Lumpur pada 09.04.99. Oleh itu, kami secara rendah hati memohon untuk menarik balik surat tersebut dengan sesungguhnya meminta maaf atas segala kesulitan yang dikenakan.
>
> Sekian, terima kasih.

The notice in question was in the following terms:

> Adalah saya merujuk kepada surat tuan bil. LCL/L/050/98/LKT bertarikh 10 April 1999 kepada yang Amat Arif Hakim Besar Malaya di mana tuan menyatakan bahawa perkara yang dibangkitkan dalam surat tuan terdahulu telahpun diselesaikan dengan sewajarnya oleh Yang Arif Hakim Mahkamah Tinggi Kuala Lumpur pada 9.4.99.

2. Adalah saya diarahkan oleh Yang Arif Dato' Dr. Kamalanathan Ratnam untuk menyatakan bahawa surat tuan telah memberikan suatu gambaran yang tidak tepat berkenaan apa yang telah sebenarnya berlaku selepas tuan menghantar surat tuan yang terdahulu kepada Yang Amat Arif Hakim Besar Malaya. Surat tuan telah memberikan gambaran bahawa suatu rundingan telah diadakan dengan Yang Arif Dato' Dr. Kamalanathan Ratnam berkenaan penyelesaian ini. Maka tuan diminta menunjuk sebab kenapa tuan tidak perlu disoal-siasat di Mahkamah Terbuka kerana tidak memberitahu segala apa yang sebenarnya berlaku dalam surat tuan kepada Yang Amat Arif Hakim Besar Malaya.

3. Tarikh tunjuk sebab di hadapan Yang Arif Dato' Dr. Kamalanathan Ratnam ditetapkan pada 27.4.99 di Mahkamah Terbuka pada pukul 9.00 pagi. Tuan boleh diwakili oleh peguam sekiranya tuan fikirkan perlu.

The appellant responded to this notice and appeared before the learned judge. In the meantime, he wrote a letter to the Chief Judge of Malaya clarifying his position. That letter was highly complimentary of the learned judge. It contains an entirely satisfactory explanation as to why the letter, as reproduced above, was written. In the proceedings before the learned judge, the appellant apologised. But all to no avail. At the conclusion of the inquiry, the learned judge found the appellant guilty of contempt. He was sentenced to a fine of RM10000 in default three months imprisonment. A further order was made; and quite an extraordinary one in our view; that required the appellant to pay the fine by 1.30pm on the same day. The fine was paid before the set hour. The appellant now appeals to us to quash the conviction and to set aside the sentence.

In this appeal, Mr. Joseph Yeo appeared for the first, second and third respondents. In the finest traditions of the Bar, Mr. Yeo informed us that he was not supporting the conviction. It is our pleasure to commend his conduct. Mr. Naban appeared and argued the appeal by advancing several grounds. By reason of the decision here arrived at, we find it unnecessary to deal with all of them. We would therefore address what we consider to be two most important grounds.

The first is that there was no formal charge formulated and framed against the appellant. This, of course, is a very important point. To recapitulate, the notice to show cause did not allege any misconduct or criminality on the part of the appellant requiring an answer. It did not set out any charge. It did not say that if the appellant could not satisfactorily explain his conduct, he would be punished for contempt. These are essential ingredients in summary proceedings for contempt. If authority is required for such an elementary point, it is to be found in the judgment of Lord Salmon in *Maharaj v. Attorney-General of Trinidad and Tobago* [1977] 1 All ER 411 where (at p. 416) he said:

> In charging the appellant with contempt, Maharaj J did not make plain to him the particulars or the specific nature of the contempt with which he was being charged. This must usually be done before an alleged contemnor can properly be convicted and punished (*Re Pollard* [1868] LR 2 PC 106). In their Lordships' view, justice certainly demanded that the judge should have done so in this particular case. Their Lordships are satisfied that his failure to explain that the contempt with which he intended to charge the appellant was what the judge has described in his written reasons as 'a vicious attack on the integrity of the Court' vitiates the committal for contempt. Had the judge given these particulars to the appellant, as he should have done, the appellant would no doubt have explained that the unjudicial conduct of which he complained had nothing to do with the judge's integrity but his failure to give the appellant's clients a chance of being heard before deciding against them.

At the risk of repetition, here too no particulars of the charge as required by law were given to the appellant. Since no charge was properly framed and no sufficient particulars were given, the conviction for contempt must have come as a complete surprise to the appellant at the conclusion of the show cause proceedings. It is not to be forgotten that the notice merely required that the appellant to appear and to be examined. There was not a word that he was liable to be punished at the conclusion of the inquiry. On this ground alone, the proceedings before the learned judge were a nullity. They were entirely void. They were in breach of the rules of natural justice. They violated the appellant's fundamental right under arts. 5 and 8 of the Federal Constitution, namely the right to a fair procedure before being punished. The appeal should succeed on this ground alone. However, it is important to the legal profession, as much as it is to the appellant, that we vindicate him. There should be no lingering doubt that the appellant was guilty of any offence, let alone contempt of court. We therefore propose to deal with the second ground.

Mr. Naban submitted that the appellant had not committed any contempt of court at all. At the heart of this submission, lies the very meaning of the expression "contempt of court". Now, there is some judicial opinion that the phrase "contempt of court" is misleading and that it is a misnomer. In *Solicitor-General v. Radio Avon Ltd & Anor* [1978] 1 NZLR 225 at 229, a very strong bench of the Court of Appeal for New Zealand presided by Richmond P. who said:

> It will be as well, before proceeding further, to say something of the expression of 'contempt of court' and of the purpose of the law of contempt in our society. The use of the term 'contempt of court' has been criticised, with some justification, as inaccurate and misleading. As was pointed out by the Report of the Committee on Contempt of Court (Cmnd 5794), presented to the United Kingdom Parliament in 1974, and generally referred to as the Phillimore Report,

the term may suggest in some context, that the law of contempt exist to protect the dignity of judges whereas in fact it exist to protect the administration of justice. This point was made by Lord President Clyde in *Johnson v. Grant* [1923] SC 789. The Lord President said …

> The phrase 'contempt of court' does not describe the true nature of the class of offence with which we are here concerned … The offence consists in interfering with the administration of justice of the Law; in impending and perverting the course of justice … It is not the dignity of the Court which is offended – a petty and misleading view of the issues involved – it is the fundamental supremacy of the law which is challenged' (*ibid* 790).

The essential question, in the present appeal, is whether the appellant had in any way interfered with the administration of the law or had impeded and perverted the course of justice by writing the letter that he did. It will be seen at once that we are borrowing the phraseology of Lord President Clyde in *Johnson v. Grant* [1923] SC 789.

In answering the question we asked a moment ago, we must hearken back to the letter which formed the subject matter of the charge. There is nothing in that letter, in our view, which either impedes or obstructs the course of justice. Neither is there any express or implied libel against the learned judge. The letter merely says that the matter has been resolved or words to that effect. There is no suggestion that the learned judge acted with any impropriety. The letter was neither a libel against the learned judge nor had it muddied the pure waters of justice. Put shortly, it was not contempt. If only the learned judge had the restraint to appreciate the explanation given by the appellant, he would have realised how wrong his perception of the entire matter was.

There are two other short observations which we would like to make.

First, this is a case in which the appellant displayed no defiance. He was entirely apologetic for the misunderstanding which had occurred through no fault of his and for an incident of which he was neither the author nor the cause. It must be remembered that all this happened because the registrar had said that the learned judge would not be bound by the findings of the Shah Alam High Court. The appellant did not apologise once. He apologised several times both in writing and orally. The conviction and sentence in the face of such apology smacks of oppression.

We need not look far for support for the view which we have just expressed. It is to be found in the passage of a very learned judge of the Indian Supreme Court in *Dinanbandhu Sahu v. The State of Orissa* AIR [1972] SC 180 at 182. In that case, P. Jaganmohan Reddy J had this to say:

> The apology tendered was not merely an apology but was something more than an apology because what was asked of the Court out of its generosity was forgiveness; that this was sincerely meant is amply demonstrated by its being repeated again before us. We think that the contempt if any has been certainly purged in the manner in which the apology was given and the matter should have been set at rest. **It is no part of the judicial function to be vindictive or allow any personal or other considerations to enter in the discharge of its functions** and since both the learned Chief Justice and Misra J. would have been prepared to accept that apology if it was given by the appellants themselves and in writing and since Mr. Chari said that the appellants themselves would have been prepared to give such an apology in writing, if that was the only thing that was required and even now are ready and willing to do so we feel that the apology tendered on their behalf by their Senior Advocate can well be accepted and the proceedings closed. (emphasis added).

It is our misfortune to observe that there was vindictiveness here. The contempt of court proceedings were instituted against the appellant and pursued despite the appellant tendering several forms of apology.

Now the second observation. The administration of justice is not merely in the hands of judges and other officials of the court. The Bar is a critical partner in the function which the court carries out. That function is to ensure that members of the public, and the litigants in the courts, who are the ultimate consumers of the product of the court, that is to say, justice, receive it in an untainted form. We are all mere tools of justice. The court is merely the conduit through which justice flows continuously and flows pure. Proceedings for contempt – it has been said often enough – are there to protect and defend the integrity of justice itself. It is not to protect the self-righteousness of individual judges or their personal pride. Taking offence on small points and becoming enraged on trivia to the extent of subjecting an advocate to contempt proceedings is neither in the best traditions of the bench nor enhances the dignity of the court. Quite to the contrary, if contempt proceedings are instituted purely because of the personal ego of a judicial arbiter, it brings indignity to the court and muddies the very streams of justice that a judge has by his oath of office sworn to keep pure.

These observations are made to remind ourselves and members of this great institution of the noble burden which they have sworn to carry on their shoulders. Members of the bar are already under considerable pressure to canvass their clients' case to the best of their ability. Judges should not make that burden even greater by instituting oppressive contempt proceedings.

For the reasons already given, this appeal must succeed. The conviction is quashed, the sentence is set aside and the fine paid is to be refunded. We wish to state that the appellant leaves this court without any blame attaching to his professional conduct and without any blemish upon his character. We wish to thank counsel for the appellant for making available the relevant authorities. But for their effort this *ex tempore* judgment would not have been possible. Our learned brother, Abdul Kadir bin Sulaiman JCA will now read the formal orders to be made in this appeal.

Arguments heard on 22 July 2002 and judgment reserved to this day.